

**ST 02-11**

**Tax Type: Sales Tax**

**Issue: Commerce Clause (U.S. Const.) Controversy**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

**v.**

**ABC SUPPLY CO.,  
TAXPAYER**

)  
) **No. 00-ST-0000**  
) **NTL No. 00 0000000000000000, and**  
) **Nos. 00 000000000000000000000000**  
)  
) **Kenneth J. Galvin,**  
) **Administrative Law Judge**

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Mr. Warren J. Marwedel, on behalf of ABC Supply Company, Mr. George Foster, on behalf of the Department of Revenue of the State of Illinois.

**Synopsis:**

This matter comes on for hearing pursuant to ABC Supply Company's (hereinafter "ABC") protest of Notices of Tax Liability No. 00 0000000000000000 and 00 0000000000000000, 00, 00 and 00 (hereinafter the "NTL's"). The "SF" NTL represents liability for Retailers' Occupation Tax of ABC due to the Department for the months of July 1, 1995 through December 31, 1998 and the "DF" NTL's represent liability for Chicago Soft Drink Tax of ABC due to the Department for the same time period. ABC maintains that the Department's levy of sales tax on ABC's sales to ocean going vessels violates the Tariff Act of 1930 and is preempted by the Foreign Commerce

Clause and Import-Export Clauses of the U.S. Constitution. On November 7, 2001, the parties entered into a stipulated statement of facts and agreed to submit memoranda of law in lieu of an evidentiary hearing. Following submission of the stipulated facts, ABC's Memoranda, the Department's Response and ABC's Reply, and the relevant case law, it is recommended that the NTL's issued to ABC be finalized as issued. In support thereof, the following "Findings of Fact" and "Conclusions of Law" are made.

**Findings of Fact:**

1. Except as provided in ¶ 3, ABC Supply ("ABC") an Illinois corporation, sells supplies to vessels calling on the deep draft ports of Illinois. Stip. ¶ 1.
2. It is the intent of ABC to supply vessels engaged exclusively in the transport of cargo in interstate and international commerce. To ABC's knowledge, these vessels do not enter the inland waterways of Illinois, except as provided in ¶ 3. Stip. ¶ 2.
3. One customer, XYZ Marine, has two tugs which are capable of going upriver, and thus entering the inland waterways of Illinois after being supplied at one of the deep draft ports of Illinois, but ABC is not aware or given notice if these tugs proceed to the inland waterways of Illinois, although it is very likely that they have done so. ABC has, on no more than two or three occasions over the taxable period, loaded XYZ's vessels at an inland waterway in Anywhere, Illinois. Stip. ¶ 3.
4. ABC has not provided sales records, books of sale, invoices or documents showing the names and addresses of the customers in the transactions that were the basis of the NTL's, the character or nature of each transaction, the receipts realized from each transaction or any other information showing that the transactions were non-taxable.

5. The owner of ABC supplies tugs entering the inland waters, through a separate corporation called ABC II Company. ABC II Company supplies tugs entering the inland waterways of Illinois. ABC agrees that these supplies are subject to sales tax, and, to the best of its knowledge, that tax is collected. The Department reserves the right to dispute this representation in the event of a future audit of ABC II Company. Stip. ¶ 4.
6. ABC supplies food and food-related items, such as utensils, plates aluminum foil and charcoal. Stip. ¶ 5.
7. ABC does not supply alcohol, other than occasional supplies of beer to foreign vessels. Stip. ¶ 6.
8. Most of ABC's sales made to watergoing vessels were made in either Illinois or Indiana, with small numbers of sales occurring in Wisconsin and Michigan. The Department does not seek to levy sales tax on sales occurring in Indiana, Wisconsin or Michigan. Stip. ¶ 7.
9. With the exception of the sales referenced in ¶ 3, these sales were made to oceangoing and deep draft vessels with "live-board" crews for the purpose of provisioning those crews. Stip. ¶ 8.
10. Except for the sales referenced in ¶ 3, orders for the supplies are taken and supplies are delivered aboard the vessels while the vessels load or discharge cargo. After the cargo is loaded or discharged, the vessels leave Illinois, and the supplies on board after the vessels leave Illinois are not thereafter diverted to domestic use in Illinois. Stip. ¶ 9.
11. ABC takes the position that transfer of ownership of the supplies takes place aboard the vessels under admiralty law and becomes equipment and appurtenances thereto. Stip. ¶ 10.
12. The vessels ABC supplies in Illinois, with the exception of the two or three occasions cited in ¶ 3, *supra*, are docked at the international harbor located in Calumet Harbor, north of the O'Brien Lock, or are otherwise upon the waters of Lake Michigan. Stip. ¶ 11.

13. Pursuant to the Sales and Use Tax Audit and the Chicago Soft Drink Tax Audit conducted by the Illinois Department of Revenue, the Department issued Notices of Tax Liability (“NTL”) designated NTL 00 0000000000000000 (7/1/95–12/31/98), NTL 00 0000000000000000 (7/1/95–12/31/95), NTL 00 0000000000000000 (1/1/96–12/31/96), NTL DF 0000000000000000 (1/1/97–12/31/97), and NTL 000000000000000000 (1/1/98–12/31/98). Stip. ¶ 12.
14. The tax includes, at least in part, assessments under the State Retailers’ Occupation Tax (“ROT”), according to the Department’s April 14, 2000, Notice of Tax Liability. Stip. ¶ 13.
15. The Department’s *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of NTL 000000000000000000 (7/1/95–12/31/98), NTL 00 0000000000000000 (7/1/95–12/31/95), NTL 000000000000000000 (1/1/96–12/31/96), NTL 00 0000000000000000 (1/1/97–12/31/97), and NTL 000000000000000000 (1/1/98–12/31/98).

### **Conclusions of Law:**

The Retailers’ Occupation Tax Act requires that every person engaged in the business of selling tangible personal property at retail in Illinois shall keep records and books of all sales of tangible personal property, together with invoices, sales records or copies of bills of sales. 35 ILCS 120/7. “The Department may adopt rules that establish requirements, including record forms and formats, for records required to be kept and maintained by taxpayers.” *Id.* The Department has established certain “minimum” requirements for record keeping, namely that a taxpayer keep “cash register tapes and other data which will provide a daily record of the gross amount of sales.” 86 Ill. Adm. Code § 130.805(a). To support deductions made on the tax return on account of receipts from sales to “exempted types of purchasers,” “entries in any books, records or other pertinent papers or documents of the taxpayer in relation thereto shall be in detail sufficient to show the

name and address of the taxpayer's customer in each such transaction, the character of every such transaction, the amount of receipts realized from every such transaction and such other information as may be necessary to establish the non-taxable character of such transaction under this Act.” 35 ILCS 120/7.

In the instant case, ABC has failed to establish the non-taxable character of the sales that form the basis of the NTL's. The parties' stipulated facts state that it is the “intent” of ABC to supply vessels engaged exclusively in the transport of cargo in interstate and international commerce. Whatever its “intent” may be, ABC has one customer, XYZ Marine, which has two tugs capable of going upriver and entering the inland waterways of Illinois, and it is “very likely that they have done so.”

This tribunal takes administrative notice that a vessel entering the inland waterways of Illinois may be engaged in intrastate commerce, and therefore subject to the pertinent taxes. The NTL's, on their face, are not specific as to the basis of the taxable sale. Further, the facts as stipulated, do not delineate whether the sales comprising the NTL's are interstate or intrastate. Sales made to XYZ Marine's vessels entering the inland waterways of Illinois would not be exempt from sales tax and ABC has failed to submit documentation that would allow me to conclude that the NTL's do not include intrastate, nonexempt sales to XYZ Marine.

The remaining facts stipulated by the parties also do not allow me to conclude that the sales that form the basis of the NTL's were exempt from sales tax. ABC supplies tugs entering the inland waterways through a separate corporation called ABC II Company. Yet the parties admit that on two or three occasions, XYZ Marine's vessels were also loaded by ABC at inland waterways in Lemont, Illinois. I am unable to establish from the stipulated facts that the sales comprising the NTL's were not made on the “two or three occasions” that XYZ Marine's vessels

were loaded at inland waterways. Other facts indicate that ABC sells to oceangoing and deep draft vessels docked at the “international” harbor located in Calumet Harbor or upon Lake Michigan. Yet XYZ Marine has two tugs at the deep draft ports which are capable of going upriver. Again, the facts do not give me any indication whether the sales included in the NTL’s were made to XYZ Marine and are therefore nonexempt.

ABC has failed to rebut the Department’s *prima facie* case of tax liability by failing to prove that the sales comprising the NTL’s were made to “exempted types of purchasers.” 35 IL:CS 120/7. Not one document was submitted by ABC identifying the customers, transactions or receipts included in the NTL’s which would allow me to “establish the non-taxable character” of the transactions. *Id.* An exemption claimant must clearly and convincingly prove entitlement to the exemption. United Air Lines, Inc. v. Johnson, 84 Ill. 2d 446 (1981). Having failed to identify the customers, transactions or receipts that form the basis of the NTL’s, it is unnecessary for this tribunal to address ABC’s arguments that the Department’s levy of sales tax on the transactions violates the Tariff Act of 1930 and is preempted by the Foreign Commerce Clause and the Export-Import Clause of the U.S. Constitution.

WHEREFORE, for the reasons stated above, it is my recommendation that NTL 00 0000000000000000, NTL 00 0000000000000000, NTL 000000000000000000, NTL 00000000000000000000 and NTL 000000000000000000 be finalized as issued.

ENTER:

March 11, 2002

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Kenneth J. Galvin  
Administrative Law Judge